UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IMAGEFIRST UNIFORM RENTAL SERVICE, INC.	:		
Respondent,	:		
and	:	**Case Nos.**	**22-CA-161563**
	:		**22-CA-181197**
LAUNDRY DISTRIBUTION AND FOOD SERVICE JOINT BOARD, WORKERS UNITED, A/W SERVICE EMPLOYEES INTERNATIONAL UNION	:		
Charging Party.	:		

RESPONDENT IMAGE FIRST UNIFORM RENTAL SERVICE, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. INTRODUCTION

As set forth in its Exceptions to the April 18, 2017, Decision issued by Administrative Law Judge Arthur J. Amchan ("ALJ") in this matter, Respondent ImageFIRST Uniform Rental Service, Inc ("Respondent," "IF" or "the Company") excepts to three unfair labor practices ("ULPs"), and the related factual findings and credibility determinations, erroneously found by the ALJ concerning actions taken by IF after it learned on Sunday, July 12, 2015, that the Laundry Distribution And Food Service Joint Board, Workers United, a/w Service Employees International Union ("Union") was attempting to organize the associates working at the Company's facility located in Clifton, New Jersey ("the Facility").[1] IF also excepts to the ALJ's unfair labor practice finding concerning a provision in the Company's handbook relating to the discussion of payroll information by associates.

Specifically, IF excepts to the ALJ's conclusions of law that the Company violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158(a)(1), by:

- "Discharging a supervisor and a lead person at the start of the organizing campaign in order to discourage employees from supporting the Union."
- "Soliciting grievances and impliedly promising to remedy those grievances in a manner different than it did prior to the start of the union campaign."
- "Increasing the frequency and quality of food provided to employees after the beginning of the organizing drive to discourage support for the Union."
- "Maintaining an illegal rule in its employee handbook."

[1] All dates are in 2015, unless otherwise specified.

(ALJD at 11:15-27) [2]

II. STATEMENT OF FACTS

A. Overview.

This case arises from IF's response to the Union's attempt to organize the associates working at the Facility. Contrary to the conclusions reached by the ALJ and as explained below, IF responded lawfully and appropriately to the Union's organizing attempt. Further, IF's maintenance of a handbook provision purporting to make discussion of payroll information a disciplinary matter did not violate the Act under the specific facts of this case. Consequently, the Board should grant the Company's exceptions and dismiss the related allegations of the First Amended Complaint.

B. The Facts Relating to the Company's Handbook.

IF does not dispute that it's English-language Handbook contained the following provision:

> Certain serious offenses can result in immediate suspension or termination: These include, but are not limited to:
>
> I. Discussion of payroll information."

GC-4 at IF000013. Further, IF acknowledges that in the normal case – *i.e.*, where employees receive a handbook and can read and understand it – the mere presence of this language would constitute a violation of Section 8(a)(1) under current Board law. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

This, however, is not the "normal case." There is no evidence in the record that any IF associate – including the eight associate witnesses called by the counsel for the General Counsel

[2] References to the ALJ's Decision are abbreviated herein as (ALJD at page: line number). References to the record refer to the hearing of Board Case 22-CA-030064, unless otherwise designated, and are herein abbreviated as follows: Record citations to the transcript (Tr.), General Counsel exhibits (GC-), and Respondent exhibits (R-).

("CGC") – received the handbook. And there is no evidence that any associate could read or understand it.[3] Further, there is no record evidence that IF published its handbook in either Spanish or Haitian Creole, such that it might have been read or understood by any of its Clifton-based associates.

Only one associate witness, Palacios, testified about the handbook or the specific handbook provision at issue. She admitted that she could not read or understand the allegedly offending language and she admitted that she had never before seen it. Tr. at 122-24. There is no other evidence relating to this handbook provision except that of Corporate Director of Human Resources Jamee Rivers, who testified without contradiction that while the IF handbook contained the allegedly offending provision, no IF associate at Clifton or any other Company location had mentioned this provision or been disciplined for violating it. Tr. 478. She did not testify about whether or how the handbook was distributed at the Facility. Further, the CGC did not introduce any evidence, such as a signed acknowledgment, to establish that the handbook had been received by any associate at the Facility.

C. The Facts Relating to the Terminations of Supervisor Ventura and Lead Farez

IF terminated supervisor Joseph Ventura on July 20, 2015 and lead worker Miriam Farez on July 16, 2015. IF President Jeffrey Berstein instructed Clifton General Manager James Kennedy to fire both of these individuals after Berstein met with associates on July 14 and learned the extent to which both Ventura and Farez had failed to treat other associates with "respect" consistent with the Company's established values. Tr. 680-82, R-17. Consistent with his practice when visiting Clifton and other IF facilities, Berstein conducted several small group associate meetings that day. Also consistent with his practice, he asked the associates in those

[3] All of the associate witnesses called by the CGC testified in either Spanish or Haitian Creole with the assistance of a translator.

meetings what they needed to better perform their jobs and he reiterated the Company's values.[4] When discussing the values, specifically "Respect," the associates voluntarily shared with Berstein their issues with Ventura and Farez. Berstein did not ask the associates about any issues they had with Ventura or Farez and he did not indicate that he would take any action based the information shared by the associates. Tr. 680-82. After concluding his meetings that day and reflecting on the strong common thread of values issues with Ventura and Farez, Berstein concluded that both of them needed to be terminated. Tr. 682.

Prior to Berstein's July 14 employee meetings, the Company was aware that its production associates had complained about the way they had been treated by Ventura and Farez. IF first became aware of these issues a few months prior to Berstein's meetings, as established by notes taken by Human Resources Representative Caitlyn Payne following "site visits" to the Facility. Kennedy had received similar feedback from associates when conducting his daily "huddles."[5] Tr. 539-540, GC-9, GC-10. However, at that time, "it [the associates' dissatisfaction with Ventura and Farez] wasn't as bad as when [Berstein] came to visit. It was just random here and there comments from associates at that particular time." Tr. 540-541. Upon initially learning of these issues, Kennedy attempted to work with the supervisors to resolve the issues. *Id*. Kennedy, along IF Supervisor Betancourt, met with both Ventura and Farez and attempted to coach them to be "more respectful in the workplace." Tr. 541-542.

While the Company, in general, and Berstein, in particular, had some knowledge of associate dissatisfaction with Ventura and Farez prior to his July 14 meeting, Berstein discovered

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[4] Berstein testified at length about the Company's values (respect, excellence, safety and honesty) and their importance to the Company's culture. Tr. 680-82, R-17.

[5] The Company used "huddles" at least several times a week to provide information to associates and, relevant here, to ask them how the job was going, what they need in order to better perform their jobs and to generally receive feedback from associates. Tr. 557-559.

the full scope of their feelings only after asking them – as he did at every associate meeting – whether they felt respected.[6] After hearing the associates' concerns, Berstein concluded that both Ventura and Farez had failed to conform to the IF core value of respect. As a result, he instructed Kennedy to terminate the employment of both individuals, which Kennedy did.

Berstein testified at length about the Company's focus on its values, including the value of "Respect." Tr. 669-71. He also testified about IF's response to other situations where associates had breached the Company's values and that he had directed that those associates be terminated. Tr. 673-75. The Company proved that Ventura and Farez were terminated for violating the Company's established values, which Rivers, Berstein and Kennedy all testified about at length. Tr. 466, 476-77, 539, 680-81. The evidence showed that the Company regularly had terminated employees at all levels of the organization for so-called "values breaches." Tr. 673-75. When Berstein met with associates on July 14, he heard directly how strongly associates objected to the Ventura's conduct. Following that meeting, he gave direction that Ventura should be terminated. Tr. 681-82. The import of this evidence is that when senior management learned of the extent of Ventura's and Farez's failure to live up to the Company's values, it took prompt remedial action.

D. The Facts Relating to the Company's Practice of Soliciting and Remedying Grievances.

Berstein, Kennedy and Rivers all testified without contradiction regarding IF's substantial and established processes of soliciting associate grievances. Specifically, these Company witnesses described the following solicitation mechanisms:

[6] As discussed in greater detail in Sections III-B and III-C, infra, Berstein asked associates at every meeting he conducted, both at the Facility and at other IF operations, questions keyed directly to the Company's core values. He did this to emphasize the values and to solicit from associates any issues or concerns they may have.

- IF conducted "**huddles**" with associates at the start of nearly every work shift. During "huddles," associates voiced their concerns about the job or issues they may be having at "just about every meeting." Tr. 557. Also, Company supervisors, such as Kennedy, would ask the associate what they need to do their jobs and would always reiterate the Company's values. Tr. 615-616. The "huddles" have been utilized at the Clifton facility since Kennedy first started working there in 2009. Tr. 559.
- IF maintained a "**Family Matters**" board. The Company maintained this board to list issues identified by associates in "huddles", the date they were raised, and the supervisor or manager responsible for remedying the issue. Tr. 558. The board also contained a comments section so that associates could comment on whether the issues were fixed. Kennedy recalls he implemented the "Family Matters" board roughly two years after he started working in Clifton, in 2011 or 2012. Tr. 558.
- IF conducted a yearly "A**ssociates Survey**", in which associates are asked specific questions about their jobs and asked to give their opinion on how to make work "a better place." The associates then answer each question on a scale of 1-5, with a "5" meaning they are "very happy." Tr. 587. The Company then collates the information and data and reports back to the associates about the survey results and what action is being taken to improve the workplace. Tr. 587-588, R-16. This process has been in place since Kennedy first started working at the Clifton facility in 2009. Tr. 559.
- IF utilizes a so-called "**Be Remarkable**" process an annual basis. During the "Be Remarkable" process, Kennedy meets with each of the associates individually and asks each of them the following question: What do you like most about working for ImageFirst? If you could wave a magic wand and could change anything about your job

or work environment, what would it be? Do you have the tools and equipment to be your best? R-14, Tr. 560, 577-579. Kennedy tracks the responses provided by the associates and, over the course of the following, Facility supervisors and managers resolve the issues. Tr. 577-579. Kennedy then conducts an all-associate review meeting to share what issues were identified and how they were resolved. *Id*. Kennedy conducted the "Be Remarkable" process annually since he started working at the Clifton facility. Tr. 577-578.

- At every facility visit, including his visits to Clifton, Berstein conducted face-to-face meetings with associates. During these meetings, he asked associates whether the Company was dealing with them in accordance with the Company's values, including the value of "respect." Berstein asked associates whether they had the tools to do their job. Tr. 670-671. And, he asked hypothetical questions, such as "If you can wave a magic wand and could improve one thing about your job or the business, what would it be?" Tr. 671. Berstein testified that he has followed this practice at all associate meetings, at the Facility and elsewhere. Tr. 670-672.

Through all of these mechanisms, the Company solicited associate grievances on virtually a daily basis. Further, IF regularly communicated with associates about the nature of the Company's response to associate concerns. Indeed, the associates could monitor these issues in real time through the "Family Matters" board. All of these solicitation mechanisms predated the beginning of the Union's organizing effort and all were used at all IF facilities. After the Union organizing commenced, the Company simply continued to do what it had done historically– communicate directly with its associates and solicit their grievances.

E. The Facts Relating to the Provision of Food.

All of the witnesses agreed that the Company had a practice of providing food to associates from time to time. Beyond that basic fact, the associate witnesses agreed on nothing else; their testimony on this issue (as with every other issue) was inconsistent, contradictory and unreliable. Even the ALJ, in massive understatement, noted the uselessness of the associates' testimony: "The employees' testimony is not particularly helpful in determining the facts regarding these allegations. That testimony varies a great deal." ALJD 8:44-45.

In contrast, the Company's witnesses testified consistently and without contradiction on the issue of how and when food was provided. The Company's witnesses testified they had a regular practice of providing a wide variety of food on holidays and other occasions. Tr. 510, 655-656, 663-664. IF provided food to its associates to show their appreciation for the work they performed. Tr. 656.

Despite having been provided pursuant to a subpoena with documents showing IF's food purchases for several years, the CGC failed to make any specific reference to these documents at the hearing and the ALJ did not refer to them in any way in his decision. GC-14. The CGC also failed to offer evidence showing the relative value or quality of the food the Company provided before or after the Union's organizing effort commenced. To the extent that the associates witnesses' food-related testimony shows anything probative, it shows that the Company did not provide the stale bread and water before the Union showed up and that it did not provide caviar and champagne thereafter. Rather, the Company provided standard fare – pizza, chicken and rice, pasta, doughnuts, chips and the like. Tr. 655-656.

Regarding the "Lunch with the Boss" program, Kennedy testified that this program had been utilized in the Facility and that he had personally had lunch with associates. Kennedy and

Assistant General Manager Cesar Sanchez testified that the program's purpose was to create an opportunity for Facility managers to interact with associates away from the stresses of the production floor and to get to know each other on a personal level. Tr. 511-12, 528-29. Sanchez, whose employment commenced on September 1, 2015, testified he started taking associates out to lunch "about a month, month and a half after [he] started." Tr. 505. Sanchez acknowledged that he conducted the "Lunch with the Boss" program at Kennedy's instruction to get to know the associates on a personal basis. Tr. 505-506. He also heard about this program "from other managers at the location doing the *same thing*." Tr. 506 (emphasis added). Unlike other managers, Sanchez allowed associates to choose the food they wanted to eat from a menu. He also testified about the general cost of the lunches that associates had when eating with him – about $10-$20, hardly enough for a luxury spread sufficient to turn the associates' heads from the Union. Tr. 505-509. He testified credibly about the legitimate, non-discriminatory reason why some associates went out for lunch and others ate in the facility – the offsite lunches consumed too much time and the associates, therefore, preferred to order-in. Tr. 507. Finally, Sanchez testified without contradiction that each associate had "Lunch with the Boss" on only once. *Id*.

III. ARGUMENT

A. Under the Facts of this Case, IF Did Not Violate Section 8(a)(1) of the Act through the Allegedly Offensive Handbook Provision. (Exception Nos. 4, 5).

As noted above, the Company acknowledges that its handbook contains a provision that makes the discussion of "payroll information" subject to disciplinary action. However, there is no evidence in the record to establish that the handbook was distributed at the Facility or that it could be read or understood by any associate. In fact, the only evidence on this issue at the hearing established that associate witness Palacios had not seen the handbook and could not read

or understand the "payroll information" provision. The Company contends under the specific facts of this case, there is no violation of the Act.

With respect to this issue, the ALJ applied the Board's test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) to conclude that: "Respondent's maintenance of its rule against the discussion of payroll information violates Section 8(a)(1) regardless of why it was promulgated or whether it was ever enforced or disseminated." ALJD 3:16-18. The ALJ further found: "A ***reasonable employee*** would interpret [the rule] to warn against discussing wages, hours and benefits, which they clearly have a right to do under Section 7 of the Act, with other employees and with others from whom they wish to enlist support in improving their working conditions." ALJD 3:20-24, (emphasis added).

Here, there is no evidence to suggest that a ***reasonable employee*** working at the Facility would interpret the payroll provision to limit or restrain any discussion of wages or any other Section 7 activity. On the issues of reading and/or understanding – a necessary predicate to interpretation – the allegedly offending handbook provision, there was no testimony that any associate could do so. The CGC studiously avoided asking any of his witnesses about that provision. The one associate witness, Palacio, asked about it admitted that she could not read it:

> **Judge Amcham**: Are you able to read the English? At the very bottom, the last two lines?
>
> [colloquy between counsel and ALJ omitted]
>
> **Witness Palacio**: Discussion. This word, I don't understand.
>
> **Mr. Murphy**: The language that I just had you read, did you ever see that before anywhere?
>
> **Witness Palacio**: No.

Tr. at 123-124.

Based on this evidence, the question the ALJ should have considered is whether a reasonable employee at Clifton would have interpreted that the payroll information provision to

interfere with that reasonable employee's exercise of Section 7 rights. *The Room Store*, 357 N.L.R.B. 1690, n. 3 (2011) ("Here, as in 8(a)(1) cases generally, our task is to determine how a reasonable employee would interpret the action or statement of her employer, *see Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and such a determination appropriately takes account of the surrounding circumstances."); *Columbia College Chicago*, 363 N.L.R.B. No. 154 (2016) (same); *Quicken Loans, Inc*., 07-CA-145794, 2016 WL 1445983 (Apr. 7, 2016) (same). Based on the circumstances at Clifton, the appropriate answer to this question is: No.

Based on the evidence, the circumstances at IF's Clifton facility established that a "reasonable employee" could not read or understand English. A "reasonable employee" at Clifton did not receive the handbook and, even assuming receipt, could not read or understand the payroll information provision. Thus, a "reasonable employee" at Clifton would not have known or understood that this handbook provision may have impacted their ability to discuss their wages or otherwise exercise their Section 7 rights. Therefore, the Board should grant the Company's exception on this point and dismiss the related allegation of the First Amended Complaint.

B. IF Did not Violate Section 8(a)(1) of the Act by Terminating Supervisor Ventura and Lead Farez. (Exception Nos. 1, 7, 8, 9, and 15).

Applying *NLRB v. Exchange Parts*, 375 NLRB 405, 409 (1964), the ALJ "conclude[d] that this record establishes that the terminations of Ventura and Farez were motivated by the unlawful purpose to restrain, coerce and/or interfere with union activity and thus violate Section 8(a)(1)." ALJD 6:36-38. For the following reasons, this conclusion is wrong.

First, under *Exchange Parts* and its progeny:

> The lawfulness of an employer's promise of benefits during a union organizational campaign depends upon the employer's motive. See *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (citing *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964)). Thus "[a]bsent a showing of a legitimate

> business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *ManorCare Health Services-Easton*, 356 NLRB No. 39, slip op. at 21 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011) (citations omitted).

Sisters Camelot, 353 NLRB No. 13 (2013) at 7.

Here, even assuming that the terminations of Ventura and Farez can be construed as a grant of a benefit, IF had a legitimate business reason for taking that action.[7] Specifically, even though Company management (Berstein and Kennedy) had some prior understanding of the Clifton associates' dissatisfaction with Ventura and Farez, Berstein personally discovered the full extent of those feelings only through his associate interactions on July 14. He determined, based on direct associate feedback, that both Ventura and Farez had failed to abide by IF's established values, particularly the value of respect. He therefore directed Kennedy to terminate both individuals. Notably, Berstein's decision to terminate both Ventura and Farez was consistent with other termination actions the Company had taken at other locations when associates had failed to apply the Company's values on the job. Clearly, Ventura's and Farez's failure to treat other IF associates with respect, as required by the Company's established values, constituted a legitimate business reason for their termination.

The fact that Kennedy and Berstein had some knowledge of the issues involving Ventura and Farez before Berstein's July 14 associate meetings does not change this result, contrary to the contention of the ALJ. ALJD 6:27-34. Kennedy testified that he and Betancourt met with both Ventura and Farez in April and May to counsel them about the manner in which they dealt with associates. Tr. 541. Kennedy further testified that he received only limited feedback regarding the performance of Ventura and Farez before Berstein's July 14 meetings. Tr. 540-

[7] For the reasons discussed in the following section, Berstein's July 14 meetings with associates, wherein he solicited the employees' grievances regarding Ventura and Farez using his familiar "Do you feel respected?" approach, was lawful.

541. Against this background, Berstein's first-hand assessment of the extent of the values breaches of Ventura and Farez and his determination that they should be fired is both reasonable and legitimate.

Second, although the Board on numerous occasions has found the termination of an unpopular supervisor to be a violation of Section 8(a)(1) during the critical period, there is no direct authority for conclusion reached by the ALJ – that an employee-driven termination of an unpopular supervisor is illegal anytime union organizing is underway. In fact, all of the Board decisions that the Company has identified that address the propriety of the termination of an unpopular supervisor involved terminations occurring in the critical period.[8] The absence of any such direct authority[9] could be an 80-plus year coincidence, or it could reflect the Board's understanding of business realities. That is, the Act should not be read to restrain an employer from making supervisory personnel decisions based on employee feedback in the open ended context of union organizing. Here, the Company learned of the Union's organizing on July 12; that organizing has continued through the date of this brief, as demonstrated by the unfair labor practice charge filed by the Union on June 21, 2017 – a period of nearly 2 years. *See* Charge Nos. 22-CA-201018 and 22-CA-200290. Under the ALJ's crabbed view of the business world, IF would have been precluded from terminating either Ventura or Farez because their "terminations . . . were not based on any conduct occurring after Respondent became aware of the organizing campaign." ALJD 6:27-28. In other words, unless Ventura or Farez engaged in

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[8] See, e.g., *Woodbury Partners, LLC*, 353 NLRB 112 (2009); *Burlington Times, Inc*., 328 NLRB 750 (1999); *Blankenship and Assocs., Inc*., 290 NLRB 557 (1988); *Eagle Material Handling*, 224 NLRB 1529, 1533 (1976), *enfd*. 558 F.2d 160 (3d Cir. 1977); *Ann Lee Sportswear*, 220 NLRB 982, 993 (1975), *enfd*. 543 F.2d 739, 742-43 (10th Cir. 1976); *Watkins Furniture Co*., 160 NLRB 188, 192 (1966).

[9] The ALJ mistakenly relies on *Burlington Times* 328 NLRB 750 (1999) to argue that not all "unpopular supervisor" termination cases arose in the critical period context. ALJD 5:46-6:9. The facts of that case clearly show that an RC petition was filed on November 4, 1996 and that Renne, the unpopular supervisor, resigned in lieu of termination on November 5, 1996 – in the critical period.

some other type of misconduct after the organizing began, the Company literally was stuck with them. That simply cannot be the law and the Board has never attempted to tie an employer's managerial hands for however long an organizing campaign may last. In this regard, review of the ALJ's conclusion should be guided by oft-acknowledged rule that the Board does not substitute its own business judgment for that of a respondent or act as a super-Human Resources department. *NLRB v. GATX Logistics, Inc*., 160 F.3d 353, 357 (7th Cir. 1998), *enfd*. 323 NLRB 328 (1997); *McCoy v. WGN Continental Broad Co*., 957 F.2d 368, 373 (7th Cir. 1992); *Furr v. Seagate Tech., Inc*., 82 F.3d 980, 986 (10th Cir. 1996); *Corriveau & Routhier Cement Block v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969), citing *NLRB v. Ogle Protection Service*, 375 F.2d 497, 505 (6th Cir. 1967), *cert. denied* 389 U.S. 843 (1967).

C. IF, through Berstein and Kennedy, Did not Violate Section 8(a)(1) of the Act by Soliciting and Remedying Grievances. (Exception Nos. 2, 6, 10, 14, 16, 17, 18, 19, 20, 21, 22 and 23).

The ALJ recognized that "an employer who has a past policy of soliciting employees' grievances may continue such a practice during an organizing campaign." ALJD 9:23-24. The law is settled that an employer with an established practice of soliciting and resolving employee grievances may continue that practice during an organizing campaign.[10] Ignoring this precedent, the ALJ improperly found that IF violated the Act by "significantly altering its past manner and methods of solicitation." ALJD 9:25-26. In reaching that conclusion, the ALJ relied on

[10] See, *Johnson Tech., Inc*., 345 NLRB 762, 764 (2005) ("It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign."); *TNT Logistics North America, Inc*., 345 NLRB 290 (2005) (no violation during ongoing union organizing campaign where employer had a past practice of soliciting grievances through an "open door" policy); *Wal-Mart Stores, Inc*., 340 NLRB 637, 640 (2003) ("It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign."); *Curwood, Inc*., 339 NLRB 1137 (2003), *affd. in part, vacated in part*, 397 F.3d 548 (7th Cir. 2005) (employer's continued practice of allowing employee questions did not violate the Act). *See also, Longview Fibre Paper and Packaging*, 356 N.L.R.B. No. 108 (2011) (The Act was not violated where the employer demonstrated that it addressed employee complaints consistent with its past practice of soliciting and addressing complaints; and the manner and method of soliciting grievances did not deviate significantly from the practices prior to the organizing activity that utilized a variety of methods to ascertain employees' concerns, solicit suggestions, and address issues.).

American Red Cross Missouri-Illinois Blood Services Region, 347 NLRB 347, 351 (2006); *Carbonneau Industries*, 228 NLRB 597, 598 (1977), *Montgomery Ward & Co.*, 225 NLRB 112, 117-118 (1976). As discussed below, the ALJ is wrong as a matter of both law and fact.

From the legal perspective, the cases relied on by the ALJ are not on point. For example, in *American Red Cross* the Board found that the respondent had not violated that Act based on its established practice of soliciting employee grievances. 347 NLRB at 351. Thus, *American Red Cross* actually supports the Company's argument in this case – it has several solicitation processes that were not modified after the Union organizing began. *Montgomery Ward & Co.* is also inapposite, but from the opposite end of the spectrum. In that case, the Board found that there was no evidence "that the employer had engaged in solicitation of employees' complaints or grievances prior to [the union campaign]." 225 NLRB at 113. Obviously, there is substantial testimony about IF's pre- and post-organizing solicitation activities, which occurred in a variety of formats. Finally, in *Carbonneau Industries*, the Board found that the employer had a limited past practice of having an "open door" policy and "on occasion" soliciting complaints from individuals. 228 NLRB at 598. As noted, IF used a variety of solicitation mechanisms to identify associate grievances and it employed them on an almost daily basis. Clearly, none of the cases relied on by the ALJ had as extensive as a history of soliciting grievances as the IF does here.

The facts also clearly demonstrate the ALJ erred on this issue. Kennedy testified that the Facility held daily "huddles" at the start of almost every shift, which has been taking place since he first started working there in 2009. Tr. 559. Kennedy, along with his supervisors, solicited grievances from the associates during these daily huddles. Tr. 556-558. Then, in or around 2011, Kennedy expanded this process and initiated the "Family Matters" board, where the Company would post the various grievances and issues raised by associates; this board was then used to

document how the identified issues were being addressed. Tr. 558. There was no credible testimony that the "huddle" process was changed or modified in any way after the Union showed up.

Additionally, IF conducts a yearly "Associates Survey" at all its Facilities (including Clifton), in which associates are asked specific questions about their jobs and asked to give their opinion on how to make work "a better place." Tr. 586-587. The Company then gathers the information and data and reports back to the associates about the steps taken by the Company to improve the workplace. Tr. 587-588, R-16.

IF also conducts the "Be Remarkable process" on an annual basis at all of its facilities (including Clifton). During the "Be Remarkable" process, managers meet with associates on an individual basis and asked ask a variety of questions seeking input on how to make IF a better workplace. R-14, Tr. 560, 577-579. This information tracked and the facility supervisors and managers resolve each issue. Tr. 577-579. Regarding the Facility, Kennedy testified at length about the "Be Remarkable" process. Kennedy explained how he met with each associate individually to determine how each felt about the Company and to ensure there were "no roadbloacks in their way of being able to accomplish their jobs." Tr. 576-577. Kennedy detailed the mechanism he uses to track the associate responses on a spreadsheet . He went on to explain how he uses the spreadsheet to feed back the date to associates and to inform them what had been done to remedy the issues brought forward through the "Be Remarkable" process. Tr. 560-561, R-15. Regarding this feedback process, Kennedy describes how lists the issues, the "action items" to fix the issues, assigns an "owner" to be in charge of the issue and, finally, gives the date of when any particular issue was resolved. *Id*. IF contends that Kennedy's "Be

Remarkable" testimony was not rebutted. Further, there was no credible evidence that the "Be Remarkable" process was changed or modified in any way after the Union showed up.

Finally, Berstein testified at length about the face-to-face associate meetings he conducts during his facility site-visits, including his visits to Clifton. In these meetings, he asks associates whether the Company was dealing with them in accordance with the Company's values, including the value of "respect." Tr. 670-671. Berstein asks associates whether they had the tools to do their job. *Id*. Berstein further testified that he has always followed this practice and would goes through this line of question in over 90% of the associate meetings he holds. Tr. 670-672. There was no credible evidence that Berstein changed or modified in any way the conduct of his associate meetings after the Union showed up.

When he evaluated this literal avalanche of uncontradicted evidence, the ALJ improperly disregarded it and compounded his error by basing it on seriously flawed credibility findings. In doing so, the ALJ improperly relied on *E-Z Mills, Inc.*, 101 NLRB 979, 987 (1952) to discredit the testimony of Berstein and Kennedy on the scope and nature of their solicitation activities. ALJD 10:12-16. In *E-Z Mills*, the then Hearing Examiner resolved a direct credibility dispute against an employer based on its failure to call any employee witnesses to corroborate its version of events:

> As is seen, ***4 employees testified to one version of the speeches, while 3 of Respondent's top management officials testified in direct contradiction insofar as coercive content was attributed to the speeches***. Antipathy to the Union, to its organizers, and to the attempt to organize Respondent's employees was plain, however, from the versions which Gates and Haight admitted giving. In resolving the issue of credibility what is of striking significance is that though the speeches were given on all floors and to some 700-odd employees, ***Respondent did not call a single employee witness to corroborate the testimony of Gates and Haight. Such failure justifies the inference that their testimony would have been adverse or unfavorable.***

Id.

As the record clearly shows, *E-Z Mills* simply does not apply here. The Company contends that the evidence regarding its practice of soliciting grievances was unrebutted. Berstein, Kennedy and Rivers testified consistently regarding the solicitation mechanisms used by IF, how long those mechanisms had used them and how frequently. Tr. 557-560, 577-579, 587, R-14, R-16. Berstein and Kennedy testified at great length and in great detail regarding their application of these solicitation mechanisms at Clifton Unlike the case relied on by the ALJ, there is no credible evidence here that Berstein and Kennedy did not do these things. Further, the ALJ criticizes the IF managers for giving "self-serving testimony." If that is a legitimate basis for discounting testimony, then the same discount must be applied to the testimony of the associate witness, all of whom testified about their early and avid support for the Union. Tr. 68-69, 70-73, 121-122, 222-225, R-2, R-3, R-4, R-5.

As a makeweight for his erroneous conclusion, the ALJ "relies" on the associate witnesses' testimony on the solicitation issue, after having completely discredited them in every other circumstance. ALJD 10:18-27. The ALJ first cites the testimony of associate witness Ulloa as demonstrating a change in the Company's solicitation practices after July 12. *Id.* Ulloa's entire testimony (on cross-examination) on these matters is as follows:

> Q: Did the company hold meetings with employees before the Union came?
> A: Yes.
> Q: They held them frequently, right?
> A: No, not like now.
> Q: So they didn't hold the meetings frequently?
> A: Not like now. Yes, they did meetings, but no, not like now.
> [colloquy between counsel and ALJ omitted]
> Q: At those meetings before the Union came around, the Company would ask you how things were going on the job, right?
> A: Yes.
> Q: And they would ask you what you needed to do the work, right?
> A: Yes.

Tr. 250-251. Far from establishing a change in solicitation practices or even providing a basis on which to discredit Berstein and Kennedy, associate witness Ulloa's testimony is general and nonspecific. She simply keeps repeating that the Company's pre-organizing meetings were "not like now." She fails to describe how the meetings were different (in frequency or otherwise) or offer any detail on exactly how the meetings changed before the pre-Union and post-Union. In light of all her testimonial issues, associate witness Ulloa's testimony on the meetings simply is not credible.

The ALJ next relies on the testimony of associate witness Estellus (without providing a transcript citation) for the proposition that her testimony was "probative as to the lack of credibility of Kennedy and Berstein's assertions that their solicitation of grievances after the union campaign was no different than it was before the campaign." ALJD 10, n. 7. Her testimony showed nothing of the sort:

> Q: Ms. Estelus, before the Union started organizing how many times did Jeff Berstein visit the Clifton facility?
> A: He use to arrive every – he used to come over every month. Then once the Union was established he started going, he started coming back. Well, he stopped and then started coming back monthly after the Union.

Tr. 313. According to her testimony, nothing changed at all when the Union arrived. Berstein would visit on a monthly basis both before and after the Union arrived. *Id*. Whatever value this testimony may have had (IF suggests it had none) is completely destroyed by her contradictory affidavit testimony, where she stated: "Before the Union started organizing Jeff Berstein, the Employer's owner, came to the facility about once per year. GC-3 at 2:20-21. The ALJ somehow missed this contradiction, which he should have been on guard for after noting that associate witness Estellus was "unreliable on many subjects." ALJD 10, n. 7.[11]

[11] The ALJ also relied on the testimony of associate witness Dorcelin, who made no mention of the huddles prior to the Union's arrival. ALJD 10, n. 7. Simply because there was no question posed regarding what was said

The only possible conclusion to be drawn from the associate testimony is that is an utter mess – internally contradictory, unreliable and nonspecific. In a word it is incredible. The ALJ cannot legitimately or rationally rely on snippets of testimony from an associate witness, who he has generally discredited and criticized, to discredit the extensive and consistent testimony of Company witnesses. A stray sentence here or there (as in the case of associate witness Ulloa) that somehow escaped contradiction by the other associate witnesses does not make that stray sentence truthful or probative, especially when the ALJ himself finds that "[s]ome of [her] testimony is not accurate." ALJD 10, n. 7. The burden of proof here required the CGC to prove a violation by a preponderance of the credible evidence. The CGC clearly did not meet that burden and the ALJ committed error in making faulty credibility determinations to reach a desired result. The Company's exception on this point should be granted.

D. IF Did Not Violate Section 8(a)(1) of the Act by Providing Food to its Associates. (Exception Nos. 3, 11, 12 and 13).

Simply put, providing non-extravagant food or taking employees out to reasonably priced lunches is not unlawful.[12] The ALJ recognized this and notes that "[i]t is clear from the record that both before and after July 12, Respondent provided food to employees at the Clifton facility." ALJD 8:41-42. From this obvious conclusion, the ALJ launched into a benighted

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during these meetings is not probative of anything – there was no contradicting evidence to what Kennedy and Berstein described.

[12] *Evergreen America Corp*., 348 NLRB 178, 221-23 (2006) (no violation of the Act where employer provided employees with various meals, even though the value of such meals increased after organizing began, where employer had practice of its supervisors providing employees with free lunches and dinners, value of food and drinks supplied was not excessive, and attendance at these functions was voluntary); *Hanson Aggregates Cent*., *Inc*., 337 NLRB 870, 879 (2002) (because the employer had a past practice of providing food to employees, the Board found no unlawful conferral of benefits for holding picnics and taking employees out to lunch during the critical period*); E-Z Recycling*, 331 NLRB 950, 952 (2000); *Waste Management of Palm Beach*, 329 NLRB 198 (1999); *Chicagoland Television News*, 328 NLRB 367, 368 (1999); and *Kut Mfg. Co. v. NLRB*, 890 F.2d 804, 810 (6th Cir 1987) ("Supplying food and soft drinks is common place in American elections and is not the equivalent of buying votes.").

attempt to evaluate the relative "frequency and quality" of the food provided by the Company before and after the Union organizing commenced.

In finding that IF had violated the Act by providing more frequent and better meals to associates after the Union commenced organizing, the ALJ relied on exactly zero evidence form the associate witnesses – who one would have surmised would have been in the best position to testify about this issue. The associate witnesses, in fact, told wildly divergent stories regarding food. Their testimony ran the gamut from pre-Union – the Company only provided pizza on holidays (Tr. 162-165) ***or*** it only provided only rice, chicken and beans on holidays (Tr. 100, 241-43); to post-Union – the Company provided food two or three times a week (Tr. 100, 204-05) ***or*** it provided food once a month and on holidays (Tr. 343). Given this irreconcilable testimony, it was no surprise that the ALJ concluded: "The employees' testimony is not particularly helpful in determining the facts regarding these allegations. The testimony varies a great deal." ALJD 8:44-47 (emphasis added).

Finding no actual support in the record, the ALJ purported to base his finding of a violation solely on his surmise that the "Lunch with the Boss" program was "moribund in the months prior to the campaign." *Id*. This conclusion is clearly contrary to the record. Kennedy and Sanchez both testified credibly regarding IF's practice of providing food for associates and, in the case of the "Lunch with the Boss" program, the reasons for having such a practice. Tr. 511-13, 528-29. Sanchez elaborated about how he allowed associates to choose the food they wanted to eat, and the legitimate, non-discriminatory reason why some associates went out for lunch and others ate in the facility. Tr. 505-509. He further testified that was new to the facility and he simply explained he revived the "Lunch with the Boss" in an effort to get to know the associates on a personal basis. Tr. 505-506. In doing so, he testified without contradiction that

each associate had "Lunch with the Boss" on only one occasion. *Id*. Clearly, the catalyst for the "Lunch with Boss" program was Sanchez hiring and his desire to meet and talk with associates over lunch. Thus, Sanchez executed the program for a legitimate business reason – to establish a personal relationship with the associates he was responsible for managing. Further, if the program was "morbiund" prior to Sanchez joining the Company, it was because there were no new managers on staff that needed to get to know plant associates. This assessment is consistent with Kennedy's testimony that he had taken associates out for lunch from time to time. Tr. 528-529. The ALJ simply ignored all of this evidence.

In any event, the ALJ ignored the fact that under the "Lunch with the Boss" program, IF provided each plant associate with one lunch costing in the $10-$20 range. Providing one lunch over a period of three and half months, hardly evidences a change from the Company's undisputed practice of occasionally providing food to associates. Tr. 506-508, 513-514. In fact, it is entirely consistent with the undisputed practice. And given the reasonable cost of the lunches, it cannot be said that the food deviated in any way from the quality of the food previously provided. In sum, there is no record evidence to support the ALJ's conclusion that IF's provision of food to associates after the Union organizing began was either measurably more frequent or of better quality.

Even if the Board somehow determines the ALJ correctly found that IF marginally increased the frequency and quality of the food provided to its associates after the advent of the Union organizing, no remedy would be appropriate here because any change was de minimis. Here, there is no credible evidence showing how, or if, the frequency of the provision of food ***actually*** changed after July 12. At best, the ALJ could find that each associate got an additional $10-$20 lunch under the "Lunch with the Boss" program. Otherwise, the ALJ could not have

legitimately concluded that IF measurably increased the number of times it provided food to associates.

Similarly, there was no credible evidence regarding any ***actual*** change in the quality of food provided. The ALJ seems to suggest that because Sanchez allowed employees to order off a menu when he ran the "Lunch with the Boss" program, rather than simply to provide food selected by the Company, the quality of the food somehow measurably improved. ALJD 9:4-9. There simply are no facts in the record to support that inference. Associates may have selected the food they preferred, but there is nothing to show that those selections were qualitatively superior to the Company-provided food. Even if price could be considered a proxy for quality, there is no record evidence showing the relative cost of the food provided before and after the Union organizing began. In this regard, the ALJ has engaged purely in result driven speculation. The "Lunch with the Boss" program does not change does not change the de minimis nature of any violation. The record showed that each plant associate had lunch with Sanchez once. The provision of one lunch – whether chosen from a menu or selected by the Company – is nothing more than a de minis violation of the Act, if it even rises to that level. In fact, in the election objections context, the Board has routinely found such conduct did not affectthe outcome of an election. *See Sanitation Salvage Corp*, 359 N.L.R.B. 1129, 1134 (2013) ("the picnic activities complained of constitute the type of de minimus conduct the Board has found not to be objectionable"); *Chicagoland Television News*, 328 NLRB 367 (1999) (12-hour party on the day before the election not objectionable, in part, because the cost of the event was not excessive); *Jacqueline Cochran, Inc.*, 177 NLRB 837 (1969) (union's distribution of Thanksgiving turkey and Christmas party during critical period not objectionable). These cases require a finding that if any food-related violation of the Act occurred, it was de minimis.

IV. CONCLUSION

For the foregoing reasons, Respondent ImageFIRST Uniform Rental Services, Inc. respectfully urges the Board to find merit to its Exceptions to the Administrative Law Judge's Decision, and to dismiss the Complaint in its entirety.

Dated: June 23, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 23, 2017, a copy of the foregoing Respondent's Exceptions to the Administrative Law Judge's Decision and the Brief in Support of Exceptions, were served, via email, upon the following:

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